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Nos. 93-534 and 93-535

In The

Supreme Court of the United States

October Term, 1993

CITY OF NEW YORK; DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY,

Petitioners,

-against-

KAM SHING CHAN, et al.,

Respondents.

CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Petitioner,

-against-

KAM SHING CHAN, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 5310 secures to laborers and mechanics employed on federally financed construction work a right within the meaning of 42 U.S.C. § 1983 to be paid wages at not less than prevailing wage rates determined by the United States Secretary of Labor?

2. Whether petitioners have demonstrated that Congress intended to preclude resort to § 1983 to remedy violations of § 5310, where the relevant construction contracts require payment of wages at not less than federal prevailing wage rates?

3. Whether, in imposing a cap on funding of construction contracts so low as to render impossible compliance with § 5310 and in prohibiting additional funding thereof, municipal petitioners

may have coerced or so significantly encouraged the employer petitioner's violations of § 5310 that said violations were committed under color of state law within the meaning of § 1983?

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BRIEF IN OPPOSITION

Respondents Kam Shing Chan, et al., submit this brief in opposition to the petitions in Nos. 93-53[1] and 93-535 for writs of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which, on interlocutory appeal, affirmed denial of petitioners' motions to dismiss claims under 42 U.S.C. § 1983 to enforce rights secured by 42 U.S.C. § 5310.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 1 F.3d 96 and is reprinted in petitioners' appendix at A1.[1] The

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[1] Citations to the appendix filed in this Court by petitioners are indicated by a parenthesis containing an "A" followed by the page number(s). Citations to the Joint Appendix filed below are indicated by a parenthesis containing the page number(s).

opinions of the United States District Court for the Southern District of New York are reported at 803 F. Supp. 710 and appear at A26 and A79. The opinion of the magistrate judge is not reported and is reprinted at A96.

STATUTES AND REGULATIONS INVOLVED

This case concerns the proper interpretation of the Civil Rights Act of 1871, 17 Stat. 13, as amended, 42 U.S.C. § 1983, and Section 110 of the Housing and Community Development Act of 1974, 88 Stat. 649, as amended, 42 U.S.C. § 5310(a), which are reprinted at A109 and A109-110, respectively. This case also involves Reorganization Plan No. 14 of 1950, 15 F.R. 3176, 64 Stat. 1267, 5 U.S.C. App., and the Message of the President, 5 U.S.C. App., transmitted to

Congress with the Plan. Reorganization Plan No. 14 is reprinted at A111. The Message of the President appears in the appendix to this brief. Finally, this case concerns 29 C.F.R. § 5.11(a) (1992), also reprinted in the appendix hereto.

STATEMENT OF THE CASE

Statement of Facts

Plaintiffs-respondents were laborers and mechanics employed by defendant-petitioner Chinese-American Planning Council, Inc. ("CPC") in the performance of construction work financed with federal assistance received by defendant-petitioner City of New York ("City") under Title I of the Housing and Community Development Act of 1974 ("HCDA"), 88 Stat. 633, as amended, 42 U.S.C. § 5301 et seq. CPC and the City,

acting through its Department of Housing Preservation & Development ("HPD"), entered into three contracts covering September, 1986 through December, 1989, under which CPC was to repair and rehabilitate City-owned housing.

Each of the contracts contained the following clause:

> The Contractor acknowledges that this Agreement is funded under a program providing direct financial assistance from the Federal government to the City and HPD and is subject to, and the Contractor shall comply with, the requirements of all applicable Federal Statutes, rules and regulations, including, but not limited to, those set forth in Exhibit F attached to this Agreement.

(89, 939r, 337) (emphasis added).

Exhibit F identified Title I as one of the "applicable Federal Statutes," stating: "This contract is subject to: Title I of the Housing and Community Development Act of 1974 {(P.L. 93-383)],

as amended ..." (120, 939ww, 373).

Title I included Section 110 of the HCDA which, as amended and codified at 42 U.S.C. § 5310(a), provides:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a--276a-5) .... The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan No. 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

Exhibit F also provided in pertinent part that

> all laborers and mechanics must be paid at a rate not less than those determined by the Secretary of Labor to be prevailing for the locality, which rates are annexed hereto as Exhibit A. These wage rates are a federally mandated <u>minimum</u> ...

(129, 939fff, 382) (emphasis in original). Each contract contained still another clause of identical import:

> All laborers and mechanics employed upon the work covered by this Contract shall be paid ... at wage rates not less than those contained in the wage determination decision of [the] Secretary of Labor (a copy of which is attached and herein incorporated by reference).

(A137, 939nnn, 390). Attached to each contract were prevailing wage rates determined by the Secretary of Labor. (155, 939gggg, 409).

The 35 respondents are construction workers most of whom emigrated from China or Hong Kong. They were hired by CPC as mason tenders, painters, carpenters, and drywall tapers and repaired and rehabilitated City housing pursuant to the CPC-HPD contracts. (767). Notwithstanding the obligations imposed by § 5310 and the aforesaid contract

provisions, CPC failed to pay respondents at federal prevailing wage rates for any of their work.

Proceedings in District Court

Respondents seek to recover the difference between what they were paid and what they were entitled to be paid. They asserted claims under 42 U.S.C. §§ 1983 and 5310, the CPC-HPD contracts and New York tort law. Petitioners moved to dismiss the federal statutory claims. The District Court (Hon. Robert J. Ward) denied dismissal of respondents' § 1983 claims, but granted dismissal of the causes of action asserted directly under § 5310. (A26-78).

In determining that § 5310 secures a § 1983 right, the Court applied the "framework" set out in Wilder v. Virginia

Hospital Ass'n, 496 U.S. 498 (1990), "with the modifications suggested by" Suter v. Artist M., ___ U.S. ___, 112 S. Ct. 1360 (1992). (A50). The Court held that § 5310 imposes a binding obligation to pay wages at not less than federal prevailing wage rates ("prevailing wages"), that § 5310 was intended to benefit respondents directly, and that it is clearly susceptible of judicial enforcement. (A60-61).

Judge Ward carefully distinguished the substantive duty to pay prevailing wages imposed on a contractor by § 5310 from the procedural requirement imposed on a federal agency by, e.g., the Davis-Bacon Act, 40 U.S.C. § 276a(a), to include prevailing wage rate provisions in construction contracts. (A55, 56-57). Because § 5310 unambiguously creates the

substantive obligation, not the procedural one, it satisfies Suter. (A61).

The District Court also held petitioners failed to demonstrate that Congress foreclosed resort to § 1983 to enforce the right secured by § 5310. Congress has not explicitly foreclosed § 1983 enforcement of § 5310 (A65). The Court therefore examined whether § 5310 creates a remedial scheme sufficiently comprehensive to demonstrate congressional intent to preclude a § 1983 remedy for violations of § 5310. (A62). In particular, Judge Ward considered whether the statutory framework is such that allowing respondents to pursue their § 1983 claims would be inconsistent with the congressional scheme. (A62-63).

That scheme balances a worker's right

to prevailing wages with a contractor's interest in knowing in advance his approximate labor costs. The contract clauses quoted above clearly apprised CPC of its obligation to pay wages at prevailing rates. And the predetermination of those rates by the Secretary of Labor provided CPC with even more precise notice of its labor costs. For these reasons, the Court found that respondents' § 1983 action, which merely sought enforcement of the Secretary's determinations, would not undermine CPC's interest in knowing in advance its approximate labor costs. (A66-67).

The Court further noted: "Unlike the comprehensive enforcement schemes in Sea Clammers and Smith v. Robinson, neither § 5310 nor the Reorganization Plan contains provisions for private judicial

remedies." (A69). Even the regulation which establishes an administrative procedure for resolution of disputes concerning payment of prevailing wages, 29 C.F.R. § 5.11(a)(1992), does not allow an employee to initiate an administrative proceeding. (A69-70). The Court also found that efforts to amend the Davis-Bacon Act were not probative of an intent to foreclose reliance on § 1983 to remedy violations of § 5310, in light of the "fundamental differences" between Davis-Bacon and § 5310. (A70-71). Finally, "there is absolutely no evidence in the legislative history of the HCDA itself that Congress sought to foreclose a § 1983 remedy under § 5310." (Id.)

The District Court also held respondents have presented sufficient facts from which it may be found that

CPC's challenged conduct was undertaken under color of state law within the meaning of § 1983. Quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), the Court held that private action is properly deemed state action when there is a sufficiently close nexus such that the private party's action may be fairly treated as that of the State. (A43). The facts alleged permit a finding that the municipal petitioners had exercised coercive power or provided such significant encouragement that CPC's failure to pay prevailing wages must be deemed to be that of the City: "as a condition for awarding the contract," the City imposed a cap on the funding of the construction contract that

> was so low as to make it financially impossible for CPC to pay prevailing wage rates as required under 42 U.S.C. § 5310.

> In short, plaintiffs have alleged facts asserting that the municipal defendants ensured that any successful bidder would be forced, for economic reasons, to violate 42 U.S.C. § 5310. If proven true, these facts would be sufficient to demonstrate that the municipal defendants "exercised coercive power or ... provided such significant encouragement" as to establish 42 U.S.C. § 1983 state action under the close nexus test.

(A47) (footnote omitted).

Court of Appeals Opinion

The District Court certified for interlocutory appeal so much of its order as denied the motions to dismiss respondents' § 1983 claims. (A79-88). The Court of Appeals granted petitioners permission to take such appeals. (A25).

A panel of the Second Circuit, composed of Judges Amalya Kearse, Richard Cardamone and Ellen Bree Burns (the latter sitting by designation),

unanimously affirmed the denial of petitioners' motions to dismiss the § 1983 claims. After reviewing Judge Ward's analysis (A7-9), the Court of Appeals, in an opinion by Judge Kearse, rejected petitioners' appeals "substantially for the reasons stated by the district court." (A11). The Circuit applied this Court's decisions defining a § 1983 "right". (A15-17).

> In the present case, we conclude that under the Wilder analysis or, to the extent that it differs, the Suter analysis, § 5310 provides these plaintiffs with a right that is sufficiently clear to be enforceable under § 1983 ....

(A17). The Court of Appeals held that respondents are among the intended beneficiaries of § 5310, that § 5310 is cast in mandatory terms and imposes an unambiguous obligation on CPC to pay prevailing wages, that the obligation is

substantive and does not merely require inclusion of a provision in a plan or contract, and that § 5310 is capable of judicial enforcement. (A17-18).

Like Judge Ward (A72-73), the Court of Appeals also noted that the fact that a statute conferring substantive rights may not itself create a private cause of action does not mean that the statute's beneficiaries are without a private judicial remedy. (A14, 15). The Court held that the scheme for enforcement of § 5310 is not "sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under § 1983." (A18). The HCDA contains no provision for private judicial remedies. (A19). Even the regulatory scheme fashioned by the Secretary of Labor under Reorganization Plan No. 14, in effect

adopted by § 5310, "does not make provision for laborers to enforce their rights administratively." (A19).

The Circuit also agreed that the facts alleged and supported by the CPC-HPD contracts support a finding that the municipal petitioners "effectively required" CPC to pay less than the minimum wages mandated by § 5310:

> CPC was required to make its bids on wages below [the federally mandated] levels; it was paid a sum that did not give it sufficient funds to pay wages at the § 5310 required minimum levels; and it was prohibited by the Contracts from receiving any additional funding for the work performed thereunder.

(Id.). These facts permit a finding that HPD exercised coercive power over and provided significant encouragement to CPC so as to render CPC's challenged conduct "under color" of state law. (A22-23). The Court rejected the argument that the

municipal defendants acted under color of federal, rather than state, law. The City's actions which caused CPC to violate § 5310 "were not required by any federal provision." (A24).

REASONS FOR DENYING CERTIORARI

In affirming denial by the District Court of motions to dismiss respondents' § 1983 claims, the Second Circuit held: (a) § 5310 secures to respondents the right to be paid for federally-financed construction work at not less than prevailing wage rates determined by the Secretary of Labor; (b) there is no indication that Congress intended to preclude resort to § 1983 to enforce § 5310 rights where, as here, the relevant contracts expressly required payment of respondents at not less than

such prevailing wage rates; (c) the circumstances presented "easily permit the inference" that the municipal petitioners coerced and substantially encouraged the employer petitioner's violations of § 5310, thus rendering those violations under color of state law for purposes of § 1983. The opinion of the Court of Appeals, like that of the District Court, carefully and correctly followed the applicable decisions of this Court, including Suter, supra.

The decision of the Court of Appeals is not "in conflict with the decision of another United States court of appeals on the same matter." Compare Sup. Ct. R. 10.1(a). Indeed, in the almost twenty years since enactment of § 5310, there has not been a single other case in which § 1983 has even been invoked by a

plaintiff seeking to enforce § 5310 (or any other similarly-worded statute). This is as true for the period since the June 5, 1992 decision of the District Court as for the period prior thereto.

Reliance upon § 1983 is made possible here only because of the unprecedented circumstances demonstrating that CPC's failure to pay prevailing wages was coerced and substantially encouraged by local governmental authorities. The uniqueness of private contractor liability under § 1983 deprives this case of general importance to enforcement of § 5310 or other prevailing wage laws.

Contrary to petitioners' contention, post-Suter litigation does not evidence confusion by the federal courts as to the criteria for determining the availability of § 1983 to remedy violations of federal

statutes. A reading of post-Suter decisions shows lower courts have uniformly and correctly adhered to the criteria set forth in Suter and other precedents of this Court. In sum, the petitions do not present circumstances warranting review by this Court of the judgment below.

I.

CONSISTENT WITH THIS COURT'S PRECEDENTS, INCLUDING SUTER v. ARTIST M., THE COURTS BELOW CORRECTLY HELD THAT § 5310 SECURES FOR RESPONDENTS THE RIGHT TO BE PAID AT PREVAILING WAGE RATES DETERMINED BY THE SECRETARY OF LABOR.

This Court has held that in determining whether a federal statute secures a substantive "right" within the meaning of § 1983, a court should determine whether the provision in question was intended to benefit the

putative plaintiff; whether it creates an unambiguous, binding obligation on the defendant against whom relief is sought; whether the obligation is a substantive one (or merely requires procedural conduct); and whether the interest asserted by the plaintiff is susceptible of judicial enforcement (or is so vague that it is beyond the competence of the judiciary to enforce). Suter, 112 S. Ct. at 1367, 1369; Wilder, 496 U.S. at 509; Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989); Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 430-432 (1987).

The courts below faithfully and correctly applied these criteria. See A15-18 and A49-61. The persons to be benefitted are specifically identified: they are "laborers and mechanics."

(A17). The congressional objective was to provide such persons with higher wages than they would be entitled to receive absent § 5310. (A54). Hence, § 5310 was clearly intended to benefit such persons. (A18). Section 5310 "is not merely a hortatory 'reasonable efforts' provision." (A17). Rather, it creates "an obligation that is cast ... in mandatory terms." (A18). Use of the term "shall" indicates Congress sought to create a binding obligation. (A60). Section 5310 is not merely a procedural provision requiring inclusion of wage terms in a state plan (or contract); rather, it imposes on the employer the substantive requirement that workers "shall be paid" at no less than prevailing wage rates. (A17). Thus, § 5310 falls on the substantive side of

the substantive/procedural dichotomy drawn explicitly in Suter and implicitly in Wilder. (A61).

The duty imposed by § 5310 "is neither vague nor speculative nor [like the obligation in Suter] left for determination by the states." (A18). "There is no ambiguity. The contractor is required to pay such workers wages at rates not lower than the federally recognized prevailing rates." (Id.). The obligation § 5310 creates "is determinable by reference to an unambiguous specified standard set by a federal official - the Secretary of Labor." (Id.). "[U]nlike the 'reasonable efforts' clause" in Suter, § 5310 creates "an unambiguous, specific benchmark." (A61). Because the Secretary of Labor predetermines wage

levels "with great specificity" (A60-61), "[t]he contractor knows exactly what wage rates will need to be paid." (A61). Accordingly, § 5310 is unambiguous and susceptible of judicial enforcement.

The assertion that respondents are not intended beneficiaries of Title I of the HCDA misses the mark. See CPC's Petition For Writ of Certiorari ("CPC") at 46, 47; Municipal Defendants' Petition For Writ of Certiorari ("City") at 24. The issue is whether respondents are among the intended beneficiaries of the command in § 5310 that laborers and mechanics "shall be paid" prevailing wages. That the overall objectives of a federal law may be broader than the purpose of a particular section therein does not mean the former may be substituted for the latter. See, e.g., West Virginia

University Hospitals, Inc. v. Casey, 885 F.2d 11, 20 (3d Cir. 1989), cert. denied, 496 U.S. 936 (1990), where in upholding a § 1983 action to enforce the Boren Amendment, the Court held that the relevant issue was "the specific purpose of § 1396(a)(13)(A)," not "the broad purpose of the Medicaid Act as a whole."

Contrary to the City's assertion (City at 11, 24), the courts below read § 5310 in light of Title I as a whole. See, e.g., A59 (conclusion that respondents are among intended beneficiaries of § 5310 is "entirely consistent with the overall congressional purpose in enacting Title I of the HCDA"). The District Court quoted the language of 42 U.S.C. § 5301(c), which provides that "[t]he primary objective of [Title I] is the development of viable urban communities,

by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." (A59, emphasis by Court). See also A10 (Court of Appeals quoting same language).

> There can be little doubt that, if CPC had paid the prevailing wage, rather than the substantially lower wage actually paid to plaintiffs, this would have provided expanded economic opportunities for persons of low or moderate income, namely plaintiffs.

(A59).

Petitioners concede that 40 U.S.C. § 276a(a), the Davis-Bacon statute, was "designed for the benefit" of workers. (City at 26 (quoting United States v. Binghamton Construction Co., 347 U.S. 171, 178 (1954)). Davis-Bacon benefits workers indirectly: it imposes a procedural obligation on a federal agency to include a prevailing wage provision in

a federal construction contract. See A56-57. By imposing the substantive duty on a contractor to pay prevailing wages, § 5310 benefits workers directly. As Davis-Bacon is "designed for the benefit" of workers, a fortiori § 5310 is too.

Contrary to CPC at 47, the rulings below are not inconsistent with the holding in Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981), that Davis-Bacon did not confer on construction workers a right to be paid prevailing wages. The courts here rejected the relevance of that holding because of the "significant" contrast between the obligation created by statutes like Davis-Bacon and the duty imposed by § 5310. (A55). See also A71 ("fundamental differences" between Davis-Bacon and § 5310) and A77, n.19

("specific language of § 5310 ... differs, in important respects, from the language of the Davis-Bacon Act ..."). See also A17 (distinguishing substantive obligation in § 5310 from procedural obligation to include in a writing a promise to pay prevailing wage rates).

Petitioners' attempt to create a "conflict in principle" between the decisions below and Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 744 (1st Cir. 1986), fails. Latinos involved a different statute and a different issue: whether 42 U.S.C. § 5309 implies a private cause of action, not whether § 1983 provides an express remedy for violation of § 5310. Latinos concluded that Title I of the HCDA was not enacted for the "especial benefit" of the

minority community and, hence, minority plaintiffs did not have an implied cause of action to enforce § 5309's generalized prohibition on discrimination. As Judge Ward noted, Latinos is plainly distinguishable. (A58-59). Unlike § 5309, § 5310 specifically identifies the narrow class of its beneficiaries, to wit, "laborers and mechanics." And, as § 5301(c) shows, Title I was intended in part to benefit respondents.

The City also argues that the mere availability of an administrative enforcement mechanism precludes the existence of a § 1983 right. (City at 16). This confuses two conceptually distinct matters: (a) a legal right and (b) the redress available for the violation of a right. The City cites Suter to support its argument but takes

the discussion therein out of context. In Suter, the plaintiffs argued that unless the statute at issue were construed to impose a substantive "reasonable efforts" obligation, rather than a procedural obligation to include in a plan a provision that "reasonable efforts" would be made, the statute would be rendered a "dead letter." In rejecting this argument, this Court noted that an administrative enforcement mechanism was still available even if the statute only created a procedural obligation, and hence this argument in favor of a substantive obligation was incorrect. See 112 S. Ct. at 1368-1369.

Respondents need not and do not make such an argument in order to show that § 5310 imposes a substantive obligation to pay prevailing wages. Hence, the

refutation in Suter of the "dead letter" argument is not pertinent here.

II.

THE COURTS BELOW CORRECTLY HELD THAT CONGRESS HAS NOT FORECLOSED RELIANCE ON § 1983 TO REMEDY VIOLATIONS OF § 5310 WHERE THE RELEVANT CONSTRUCTION CONTRACTS REQUIRE PAYMENT OF WAGES AT NOT LESS THAN FEDERAL PREVAILING WAGE RATES.

CPC states that this Court should grant certiorari

> to now decide, in the context of section 5310 and federal housing policy, the question it previously left open in Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981) -- namely, whether the Davis-Bacon Act creates a private right of action, albeit asserted procedurally here under section 1983, to enforce a contract that contains specific Davis-Bacon Act prevailing wage stipulations.

(CPC at 13-14). With all respect, this is obfuscation.

This case does not involve a claim

under the Davis-Bacon Act, nor is that Act in any material way comparable to § 5310, the statute invoked by respondents. Second, the issue whether Davis-Bacon (or any other prevailing wage statute) implies a private cause of action is fundamentally different than the issue actually presented here, namely, whether the express cause of action created by § 1983 is available to remedy the deprivation of respondents' rights under § 5310.

Davis-Bacon's prevailing wage clause, 40 U.S.C. § 276a(a), obligates a contracting federal agency to include in its advertised specifications and its resulting contracts a provision requiring the payment of wages at not less than prevailing wage rates. (A4A). In contrast, § 5310 imposes a duty on a

contractor doing work for a local government to pay workers at not less than prevailing wage rates. Davis-Bacon and § 5310 thus differ significantly. See A55, 71, 77, n.19.

Whether a federal statute impliedly creates a private cause of action to remedy a violation of that statute is "a different inquiry" than whether § 1983 is available to remedy that same violation. In the former case, the burden is upon the plaintiff to show Congress intended to create a private remedy. In the latter, it is presumed from § 1983's express language that a remedy is available and the burden is upon the defendant to demonstrate that Congress affirmatively withdrew the § 1983 remedy. Wilder, 496 U.S. at 508-09, n.9. Thus the argument that Congress "did not

intend to create any private right of action" in enacting Title I (CPC at 26), see also id. at 42-43, is irrelevant. Respondents do not seek review of the dismissal of their claims asserted directly under § 5310. Thus, the pertinent question is not whether Congress intended to create a new cause of action, but whether it affirmatively withdrew the cause of action available under § 1983.

Where, as here, there is no express withdrawal of the § 1983 remedy, private enforcement of § 5310 under § 1983 may not be denied unless Title I itself created a remedial scheme sufficiently comprehensive to demonstrate congressional intent to preclude relief under § 1983. In particular, petitioners must demonstrate that allowing

respondents to pursue their § 1983 claims would be "inconsistent" with the scheme created by Title I, that the latter "left no room" for a § 1983 remedy. Suter, 112 S. Ct. at 1368, n.11; Golden State, 493 U.S. at 106-107; Wright, 479 U.S. at 423.[2] The courts below correctly concluded that petitioners failed to satisfy this test. (A18-21, A61-71).

Petitioners argue that allowing a § 1983 suit here would undercut CPC's interest in knowing in advance its approximate labor costs and invoke Coutu, supra, to support this contention. (CPC

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[2] The relevant enforcement scheme is the regulatory scheme in 29 C.F.R. Part 5, not the statutory scheme in Davis-Bacon, 40 U.S.C. § 276a-1 et seq. Compare CPC at i, 27-28. Section 5310 incorporates the wage rate determinations by the Secretary of Labor pursuant to Davis-Bacon, but it does not incorporate that Act's enforcement scheme. Glenn Electric Co. v. Donovan, 755 F.2d 1028, 1031-33 (3d Cir. 1985).

at 29-31; City at 18-19). This argument was disposed of by the courts below:

> In the instant case, the predetermination of prevailing wage rates by the Secretary of Labor provided CPC with certainty when preparing its bid. Plaintiffs do not challenge the Secretary's determination in this regard. Any private enforcement, pursuant to § 1983, of the contractor's obligation to pay would not upset the contractor's interest in having a predetermined wage rate to factor into a bid. Thus a private right of action pursuant to § 1983 does not upset the balance of Congress' "carefully tailored scheme" that is at the heart of § 5310.

(A66-67) (emphasis in original). Coutu held that Davis-Bacon does not imply a private cause of action to recover wages at prevailing rates where it has already been determined administratively that Davis-Bacon does not apply to the work in question. As the Second Circuit observed: "Coutu's concern for the contractor's need to know in advance its

labor costs is not an issue here, since the Contracts expressly required the payment of wages at Davis-Bacon levels." (A21). See also A67-68.

CPC executed contracts which were expressly subject to Title I, which expressly required that respondents be paid prevailing wages, and to which were attached prevailing wage rates determined by the Secretary of Labor. As alleged in the First Amended Complaint, CPC's failures to pay respondents prevailing wages were "willful" (37, 40). On these facts, it is disingenuous at best to claim that CPC did not know in advance its approximate labor costs or that its obligation to meet those costs was "unexpected." (City at 18, 19).

Petitioners argue a § 1983 cause of action would be inconsistent with the

express purpose of Reorganization Plan No. 14 (A111), incorporated into § 5310, to "assure coordination of administration and consistency of enforcement of" federal labor standards. (CPC at 24-25). This argument was expressly rejected by the District Court. (A68-69). The Message of the President which accompanied Plan No. 14 provided:

> The methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity of enforcement is lacking and the degree of protection afforded workers varies from agency to agency.
>
> In order to correct this situation, this plan authorizes the Secretary of Labor to coordinate the administration of legislation relating to wages and hours on federally financed or assisted projects by prescribing standards, regulations and procedures to govern the enforcement activities of the various federal agencies ....

Message of the President, 5 U.S.C. App.

(emphasis added). (The Message of the President is reprinted in the appendix hereto.)

> [T]he President's transmittal message makes clear [that] this "consistency of enforcement" refers to a consistent approach to enforcement across government agencies, and thus would not preclude private enforcement.
>
> * * *
>
> Thus, the Reorganization Plan was designed to remedy inconsistent application of federal labor standards by federal administrative agencies. This congressional and presidential interest in a uniform approach to enforcement by federal agencies would not be undermined by a § 1983 right of action. Certainly there is no evidence that Congress or the President even considered private enforcement when they placed the "consistency of enforcement" language in the Reorganization Plan.

(A68, 69) (emphasis in original).

Unlike Davis-Bacon, see 40 U.S.C. § 276a-2(b) (CPC at 4C), the HCDA does not authorize a private action on a bond

to recover wages due. Petitioners concede that neither the HCDA, Reorganization Plan No. 14 nor the Secretary of Labor's regulations provides workers with any private cause of action to recover prevailing wages. (CPC at 16, 25, 42).[3] CPC's argument, that omission from the HCDA of any private judicial remedy supports the conclusion that Congress foreclosed resort to § 1983 to enforce § 5310 (CPC at 17), turns this Court's jurisprudence on its head. It is

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[3] The only suit authorized by the HCDA is an action by the Attorney General under 42 U.S.C. § 5311(b) against a "recipient of assistance." The latter is the state or local government which has received federal financial assistance, not, as CPC apparently wishes, a contractor which has violated § 5310. Compare CPC at 43-44. A recipient may be sued under § 5311(b) only for its own violation of Title I. Respondents do not contend that the City violated Title I, only that it caused CPC to violate CPC's duty under Title I.

the presence in the underlying statute of a specific private judicial remedy which may permit the inference that Congress intended to foreclose resort to § 1983. E.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 13-14, 20-21 (1981). Omission from the HCDA of any private judicial remedy supports resort to § 1983.

Nor is a private remedy to recover prevailing wages available under the regulatory scheme. Title 29 C.F.R. § 5.11(a)(1992) provides:

> This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor(s).

(Emphasis added). Thus, employees may

complain all they want of an employer's violation of § 5310, cf., CPC at 41-42; City at 13, but they have no ability to initiate an administrative proceeding to obtain redress. (A19-20, A69-70). Indeed, at the time the HCDA was enacted, regulations permitted only the contract-administering agency to initiate such proceedings. (A20). See 29 C.F.R. § 5.11(b)(1974) (A128).

Petitioners say that "[a]fter the ALJ renders a decision" in a § 5.11(a) proceeding, laborers and mechanics may appeal the ALJ's decision. (CPC at 14, n.6; CPC at 41). Of course, this assumes there is such a proceeding. Moreover, any appeal would be discretionary, 29 C.F.R. § 7.1(b), and the Wage Appeals Board ordinarily does not consider matters de novo. (29 C.F.R. § 7.1(e)).

Thus, even if workers are allowed an appeal, it would be on the basis of a record developed in a proceeding in which they were not parties.[4]

The availability of administrative mechanisms to protect a plaintiff's interest does not suffice to demonstrate that Congress intended to foreclose a § 1983 remedy. Golden State, 493 U.S. at 106. Petitioners' reliance on regulations permitting withholding, suspension or termination of contract funding and the like (CPC at 37; City at

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[4] The regulations pertaining to a "DOL-directed" hearing "at the initial contracting stage" (CPC at 39), see 29 C.F.R. Part 1, have no probative value or even relevance here. As petitioners' euphemism ("DOL-directed") suggests, a worker may not initiate such a hearing. No such hearing was in fact initiated by anyone here. Moreover, the Part 1 regulations concern individual wage rate determinations, determinations which respondents do not challenge.

14) is unavailing. Such enforcement mechanisms do not prove an intent to foreclose resort to § 1983. Wilder, 496 U.S. at 521-522; Wright, 479 U.S. at 428.

The assertion that courts will enjoin entire HCDA projects, if § 1983 actions to enforce § 5310 are brought, borders on the frivolous. (CPC at 36). There is no reason to think laborers or mechanics would seek to halt their own employment or why courts, faced with contractor violations of § 5310, would enjoin such employment, rather than order the contractor to pay prevailing wages.

III.

THE COURTS BELOW CORRECTLY HELD THAT RESPONDENTS PRESENT SUFFICIENT FACTS FROM WHICH IT MAY BE FOUND THAT PETITIONERS ACTED UNDER COLOR OF STATE LAW.

The close nexus test "establishes a relatively small range" (A44) of conduct by a private entity that is properly deemed under color of state law for purposes of § 1983. The courts below held that a sufficient nexus between acts of a private party and a government is not established merely because a private entity is affected with the public interest; or that a state has approved or acquiesced in the initiatives of the private entity; or that the private entity is subject to extensive regulation or is publicly subsidized or has been given monopoly status. (A22, A44). Of particular relevance, both courts noted

that acts of a private contractor do not become governmental action by reason of the contractor's substantial or total engagement in performing public contracts. (A22, A44). At the same time, both recognized that conduct of a private entity may be deemed under color of state law when a government has coerced or substantially encouraged that conduct. (A22-23, A44-45).

Those courts faithfully applied this Court's precedents, thereby rendering petitioners' objection an essentially fact-bound complaint. Conduct of a private entity is properly deemed governmental action or action under color of law when coerced or substantially encouraged by a government. E.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614-616 (1989); Blum

v. Yaretsky, 457 U.S. 991, 1004 (1982). The facts justifying a finding of municipal coercion or substantial encouragement of CPC's failure to pay respondents prevailing wages are detailed by the Court of Appeals (A5-6, 23) and need only be summarized here.[5] HPD's bid solicitations provided that the overall budget for each construction contract would be determined by a "Person-Day Rate," multiplied by the number of workers, multiplied by the number of days worked. The "Person-Day Rate" included not only wages but all other costs of running the program. HPD expressly

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[5] As the issues here arise on an interlocutory appeal from the denial of motions brought pursuant to Fed. R. Civ. P. 12(b)(6), the precise question is whether "it appears beyond doubt that [respondents] can prove no set of facts in support of [their] claim which would entitle [them] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

placed a ceiling on the Person-Day Rate for each contract which was so low that there were not enough contract funds to pay laborers and mechanics federally mandated prevailing wages. Further, HPD expressly forbade CPC from obtaining additional funding for the contract work. In the words of the Court of Appeals:

> Thus, to win the Contracts, CPC was required to make its bids based on wages below [prevailing wage] levels; it was paid a sum that did not give it sufficient funds to pay wages at the § 5310-required minimum levels; and it was prohibited by the Contracts from receiving any additional funding for the work performed thereunder.

(A23). See also A46-47.

CPC effectively concedes that the City coerced its violations of § 5310. In its First Amended Answer, para. 104, CPC states: "CPC was required by the City and HPD under each master agreement to pay plaintiffs less than prevailing

wages." (931). In a memorandum, CPC stated: "[T]he City effectively prohibited CPC from paying the participants anything approaching prevailing wage rates." (904). See also CPC at 51 (Person-Day Rate was "set by the municipality so low as to make it financially impossible [for CPC] to pay prevailing wages").

Contrary to CPC at 57, a private entity is not subjected to vicarious liability under the close nexus test. CPC is subject to liability under § 1983 for its own conduct, to wit, its failure to pay employees prevailing wages. See Skinner, supra (acts of private employer substantially encouraged by government may subject employer to liability in suit by employees challenging those acts as governmental action).

CPC argues that the municipal defendants acted under color of federal, and not state, law. (The City itself eschews this argument.) The City's challenged conduct included its imposition of a ceiling on the Person-Day Rate. As the Second Circuit noted, placing a cap on this budget-determining factor was "an attempt by the City to limit any call upon its own treasury for the projects in question." (A24). The municipal conduct which caused CPC's violations of § 5310 resulted from the City's own financial concerns: the City acted to assure that project costs would not exceed the federal monies it was receiving under the HCDA. The City's challenged acts "were not required by any federal provision". (A24). To the contrary, by its terms, § 5310

contemplates HCDA projects financed "in whole" or merely "in part" with federal assistance. Hence, § 5310 expressly permits projects financed in part with municipal funds. It follows that the City's challenged conduct undertaken to assure its own funds would not be expended did not occur under color of federal law for purposes of § 1983.[6]

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[6] Dixson v. United States, 465 U.S. 482 (1984), on which CPC relies (CPC at 60-62), is plainly distinguishable. Dixson was a criminal case which involved neither § 5310 nor § 1983. Because Dixson had "official federal responsibilities" under the HDCA, this Court held that he acted "for or on behalf of the United States" within the meaning of 18 U.S.C. § 201. However, a person does not act under color of law within the meaning of § 1983 simply because (s)he has assumed governmental responsibilities: there must be a close nexus between the government and the particular conduct challenged. Blum, 457 U.S. at 1004 (quoting Jackson, 419 U.S. at 350. Thus, assuming arguendo that the municipal petitioners generally acted "for or on behalf of the United States" within the meaning of § 201, such a

IV.

THE DECISIONS BELOW DO NOT WARRANT REVIEW BY THIS COURT.

The municipal petitioners suggest that denial of certiorari will result in a flood of § 1983 claims for prevailing wages under § 5310 and/or substantially identical prevailing wage statutes. (City at 20-23). They also claim a need to resolve purported confusion among lower courts as to the proper test for § 1983 enforcement of federal statutes. (City at 27-28). Neither of these assertions supports review by this Court of the Second Circuit's judgment.

As to petitioners' "doomsday scenario" (A77, n.19), a court may not nullify

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conclusion would not convert the specific municipal actions challenged here into action under color of federal law for purposes of § 1983.

respondents' otherwise meritorious § 1983 claims because a case might, theoretically, invite other such claims. (Id.). Moreover, petitioners' scenario is theoretical at best. The HCDA was enacted almost twenty years ago. Not only is the Second Circuit's judgment not in conflict with any decision of another court, research has not disclosed a single other case in which enforcement of § 5310 pursuant to § 1983 has been sought.[7]

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[7] The lack of such § 1983 claims was not due to a belief that § 1983 did not provide a remedy for violations of statutes such as § 5310. As early as 1947, the Second Circuit, per Learned Hand, held that § 1983 provides a remedy for violations of federal statutes generally. Bomar v. Keyes, 162 F.2d 136, 139 (2d Cir.), cert. denied, 332 U.S. 825 (1947). By 1974, the year of enactment of the HCDA, several other courts of appeals had reached the same conclusion. Blue v. Craig, 505 F.2d 830, 834-838 (4th Cir. 1974); Anderson v. Graham, 492 F.2d 986 (8th Cir. 1973); Gomez v. Florida State Employment Service, 417 F.2d 569, 579 (5th Cir. 1969).

Of the approximately sixty prevailing wage laws enacted by Congress since 1931, petitioners cite six extant statutes which, like § 5310, provide that workers "shall be paid" prevailing wages. See, e.g., City at 20-21.[8] However, there is

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[8] Petitioners also refer to four other provisions to which, they say, the Second Circuit's reasoning would apply: National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. § 954(n); Older Americans Act of 1965, 42 U.S.C. § 3027(a)(14)(D); Solid Waste Disposal Act, 42 U.S.C. § 6979; Hospital Survey and Construction Act, 42 U.S.C. § 291e(a)(5). Unlike § 5310, however, these provisions do not impose a duty on a contractor to pay workers at not less than prevailing wage rates. Three impose on an applicant for federal monies the obligation to furnish to the relevant federal agency an adequate or reasonable assurance that workers will be paid prevailing wages. The fourth of these, 42 U.S.C. § 6979, prohibits the federal agency from awarding a grant unless the appropriate federal official finds that the application therefor contains or is supported by such an assurance. (A118-121). As explained above, such procedural obligations are plainly distinguishable from § 5310.

not one case in which § 1983 has been invoked to enforce any of these similar provisions. And what was true before the decisions below remains true today: in the more than sixteen months since Judge Ward rendered his opinion denying dismissal of respondents' § 1983 claims, there has not been any other § 1983 litigation to enforce § 5310 or any comparably-worded statute.

The reason for the lack of such litigation is the difficulty of satisfying § 1983's 'under color of state law' requirement. Section 5310 and similar provisions impose a duty on a private contractor. The standard for rendering conduct of a private contractor subject to § 1983 "is a difficult one to attain". (A43). The circumstances evidencing the City's coercion and

substantial encouragement of CPC's violations of § 5310 are unique and unlikely to be duplicated by other local governments. Petitioners' prediction of a wave of § 1983 claims to enforce prevailing wage laws is overblown.

The City's claim of lower court "uncertainty" concerning the "proper framework" for § 1983 enforcement of federal statutes is also hyperbole. The opinions cited by the City show consistent adherence to the criteria set forth in Suter and prior precedents, including Wilder. See pages 20-21 supra. In each case, the court dismissed a § 1983 claim for failure to satisfy one or more of those criteria. Rather than manifesting "confusion", the decisions cited actually show the lower courts have been applying the very same criteria as

did the courts in the instant case.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Dated: October 21, 1993

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MESSAGE OF THE PRESIDENT, 5 U.S.C. App.

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949.

To the Congress of the United States:

I transmit herewith Reorganization Plan No. 14 of 1950, prepared in accordance with the provisions of the Reorganization Act of 1949. For the purpose of coordinating the administration of labor standards under various statutes relating to Federal construction and public works or to construction with federally financed assistance or guaranties [sic], the reorganization plan authorizes the Secretary of Labor to prescribe appropriate standards, regulations, and procedures with respect to these matters and to make such investigations concerning compliance with, and enforcement of, labor standards as he deems desirable. The purpose is to assure consistent and effective enforcement of such standards.

The plan is in general accord with the recommendations of the Commission on Reorganization of the Executive Branch of the Government. It constitutes a further step in rebuilding and strengthening the Department of Labor to make it the central agency of the Government for dealing with labor problems.

After investigation I have found and

hereby declare that the reorganization contained in this plan is necessary to accomplish one or more of the purposes set forth in section 2(a) of the Reorganization Act of 1949.

There are several laws regulating wages and hours of workers employed on Federal contracts for public works or construction. The "eight hour laws" limit the employment of laborers and mechanics on such projects to 8 hours per day and permit their employment in excess of that limit only upon condition that time and one-half the basic-wage rate is paid for the excess hours. The Davis-Bacon Act provides that the minimum rates of pay for laborers and mechanics on certain Federal public-works contracts shall be those prevailing for the corresponding classes of workers in the locality as determined by the Secretary of Labor. The Copeland anti-kick-back law prohibits the exaction of rebates or kick-backs from workers employed on the construction of Federal public works or works financed by the Federal Government and authorizes the Secretary of Labor to make regulations for contractors engaged on such projects.

In addition to the above statutes, there are several acts which require the payment of prevailing-wage rates, as determined by the Secretary of Labor, to laborers and mechanics employed on construction financed in whole or in part by loans or grants from the Federal Government or by mortgages guaranteed by the Federal Government. These acts are: the National Housing Act, the Housing Act of 1949, the Federal Airport Act, and the

Hospital Survey and Construction Act of 1946.

With the exception of the Department of Labor, the Federal agencies involved in the administration of the various acts are divided into two classes: (1) agencies which contract for Federal public works or construction; and (2) agencies which lend or grant Federal funds, or act as guarantors of mortgages, to aid in the construction of projects to be build by State or local public agencies or private individuals and groups. The methods of enforcing labor standards necessarily differ between these two groups of agencies.

The methods adopted by the various agencies for the enforcement of labor standards vary widely in character and effectiveness. As a result, uniformity of enforcement is lacking and the degree of protection afforded workers varies from agency to agency.

In order to correct this situation, this plan authorizes the Secretary of Labor to coordinate the administration of legislation relating to wages and hours on federally financed or assisted projects by prescribing standards, regulations, and procedures to govern the enforcement activities of the various Federal agencies and by making such investigations as he deems desirable to assure consistent enforcement. The actual performance of enforcement activities normally including the investigation of complaints of violations, will remain the duty of the respective agencies awarding the contracts or providing the Federal

assistance.

Since the principal objective of the plan is more effective enforcement of labor standards, it is not probable that it will result in savings. But it will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.

HARRY S. TRUMAN

THE WHITE HOUSE,
March 13, 1950.

Title 29 C.F.R. § 5.11(a) (1992)

This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor(s).

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